Supreme Court, U.S.
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No. 00-1305

IN THE
SUPREME COURT OF THE UNITED STATES

Kismet Investors, Inc., a
Minnesota corporation,

Petitioner,

vs.

County of Benton,

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This supplemental brief is submitted pursuant to Supreme Court Rule 15.8, on the basis of a new case, recently decided, not available at the time of Petitioner's last filing.

ARGUMENT

On May 13. 2002, this Court decided *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S.____(May 13, 2002). Although the decision in that case ultimately favored the City of Los Angeles, over the adults-only video store/arcade challenging the ordinance in question, it is clear from the plurality, concurring, and dissenting opinions that the proper disposition of the above-entitled matter would be to grant the writ of certiorari, vacate the judgment below, and remand the matter for reconsideration in light of *Alameda Books*.

Of key importance is the following language from the plurality opinion of Justice O'Connor concerning the evidentiary burden upon municipalities to justify adult entertainment zoning ordinances under a "secondary effects" theory:

> "In *Renton*,...[w]e held that municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest [Citations omitted.] This is not to say that a municipality can get away with

> shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If Plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If Plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." [Citation omitted.] Slip opinion at pp. 10-11.

[1]Under this analysis, it was clearly inappropriate for the District Court to have granted summary judgment against

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1To be sure, this standard clearly represents only the stated of four justices, to-wit: Justices O'Connor, Chief Justice Rehnquist, Justice Scalia and Justice Thomas. However, it is clear that the four dissenting Justices, Souter, Stevens, Ginsburg, and Breyer, would require a far more stringent evidentiary showing on the part of government. See for example, slip opinion at pp. 6-7, Souter J. dissenting. Consequently, it is clear that the foregoing quotation from the plurality opinion represents the bare minimum which a majority of the United States Supreme Court would require in order to justify an adult entertainment regulation premised on a secondary effects theory. It is clearly the standard which now governs the instant case.

Petitioner with respect to the constitutionality of the ordinance in this case.

To begin with, it is absolutely clear that the ordinance itself is premised on "shoddy data or reasoning," within the meaning of the plurality opinion in *Alameda Books*.[2]

More significantly, Petitioners in the instant case clearly cast doubt on the county's rationale not only by disputing the validity of the studies the city relied upon, but by furnishing essentially uncontradicted evidence contrary to the county's rationale. In particular, Petitioner tendered the affidavit of Richard Wilson, Appendix at A.120-A.127, asserting that virtually all of the studies relied upon by the county finding that nude dancing caused adverse secondary effects dated back to the 1970's and early 1980's, during which time nude dance establishments consisted of sleazy topless bars, poorly

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2The total unreliability of the studies relied upon by Benton County in enacting its ordinances were set forth at length in the amicus curiae briefs of the First Amendment Lawyers Association, both in *Alameda Books* and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). The deficiencies of this studies is set forth in a published source in Paul, Linz & Shafer, Government Regulation of 'Adult' Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm.L & P. 355 (2001)

maintained and operated, at which people would not wish to be seen. The affidavit pointed out that over the past 15 years, the industry has dramatically changed and that the sleazy strip club has been replaced by upscale adult cabarets, featuring hospitality and customer safety, characterized by expensive buildings, substantial investments in high technology equipment such as lighting, sound, and security. The affidavit points out that far from causing property values to decline and crimes to increase, upscale adult cabarets generally enhance property values and contribute to public safety. The affidavit further points out that, based upon personal observation of Petitioner's establishment, it is far more like the upscale adult cabaret than the sleazy strip bar.

This opinion evidence was amply supported by evidence tendered in a report by Consultant R. Bruce McLaughlin, indicating that in its five years of existence, property values surrounding Petitioner's establishment increased at double the rate of unincorporated Bentor County as a whole and more than four times as fast as the comparable control use located on the same highway, but not featuring adult entertainment (Appendix at A.232-A.242). With respect to crime, the McLaughlin report pointed out, again without contradiction, that in its years of existence, Petitioner's establishment

generated, on the basis of area and seating capacity, fewer police calls than a nearby alcohol establishment not featuring adult entertainment and absolutely fewer police calls than a local gas station and convenience store. Absolutely no sex crimes or drug crimes occurred at Petitioner's establishment in five years (Id. at A.225-A.231).

Plainly, under the standard for analysis adopted by the plurality in *Alameda Books*, , the adult entertainment zoning regulation could not have been sustained in light of this evidentiary showing, without the county affirmatively presenting evidence to justify its original rationale, something the county plainly never did.

Obviously, had the Minnesota courts had the benefit of this Court's evidentiary requirements announced in *Alameda Books*, the case would have been differently decided.

Consequently, the appropriate resolution of this case is to grant certiorari, vacate the judgment below and remand the matter for reconsideration in light of *Alameda Books*.

CONCLUSION

For all of the foregoing reasons, the relief sought in the

petition for writ of certiorari should be granted.

Respectfully submitted,

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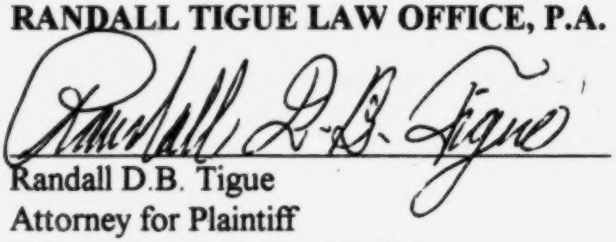

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